89-1358

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

R.W. MEYER, INC., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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See Sixth Circuit Rule 24

No. 88-2074

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. R. W. MEYER, INC., *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed November 20, 1989

Before: GUY, BOGGS and NORRIS, Circuit Judges.

GUY, Circuit Judge. Defendant, R.W. Meyer, Inc. (Meyer), appeals from a district court order granting summary judgment for plaintiff, the United States (hereinafter referred to as the Environmental Protection Agency (EPA or the government), in this action arising under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. § 9601, *et seq.* Meyer claims that summary judgment was improper for several reasons First, it claims that, as a matter of law, the government's indirect costs are not recoverable under CERCLA. Next, it contends that the district court erred in applying retroactively CERCLA's amendments

authorizing the award of prejudgment interest. Meyer also claims that the district court erred in finding the defendants jointly and severally liable under CERCLA. Finally, Meyer argues that summary judgment was improper because numerous issues of material fact surrounded the government's claimed direct costs of removal, indirect costs, prejudgment interest, and the issue whether the government's actions were consistent with the National Contingency Plan (NCP), as required under CERCLA. Having determined that the district court's resolution of this matter was correct, we affirm.

The facts underlying this case, as found by the district court, indicate that Meyer owns some property (the property) in a mixed residential, commercial, and industrial setting in Cadillac, Michigan. From 1972 until mid-1981, Meyer leased this property to Northernaire Electroplating Company (Northernaire) to operate an electroplating business. Willard S. Garwood was the president and sole shareholder of Northernaire from 1975 until mid-1981. In the course of its business, Northernaire utilized highly corrosive and caustic substances including cyanide, zinc, hexavalent chromium, cadmium, and chromic acid. In March 1983, officials from the EPA and the Michigan Department of Natural Resources (MDNR) examined the property. Their examination was prompted by earlier reports of MDNR officials indicating that the building had been locked and abandoned and that a child had received chemical burns from playing around discarded drums of electroplating waste that were left outside the building. State tests on samples of the soil, sludge, and drum contents disclosed the presence of significant amounts of caustic and corrosive materials. During their examination of the site, EPA and MDNR officials observed drums and tanks housing cyanide littered among disarray inside the facility. Based on their observations outside of the building,[1]

[1]The EPA and MDNR officials observed soil discoloration indicative of contamination in addition to pipes, an unsealed sewer line, and a "catch" basin open to the ground.

the officials determined that Northernaire had discharged its electroplating waste into a "catch" basin and that the waste had seeped into the ground from the bottom of the basin. The waste then entered a pipe that drained into a sewer line that discharged into the sewage treatment plant for the city of Cadillac.

Approximately June 28, 1983, EPA officials advised Meyer, Northernaire, and Garwood of their intent to engage in an immediate removal action on the property. Although the EPA advised the defendants that they could conduct the removal action themselves, the defendants declined to do so. Consequently, the EPA, aided by contractors, conducted the removal action from July 5 until August 3, 1983.[2]

After Meyer, Northernaire, and Garwood failed to respond to an August 13, 1984, EPA demand letter seeking payment for the costs of the removal action, the government filed a complaint against them in federal court seeking reimbursement, pursuant to CERCLA. On June 3, 1986, the government filed a motion for partial summary judgment on the issue of the defendants' liability. Following a hearing, the court granted this motion, finding the defendants jointly and severally liable for the government's response costs. *United States v. Northernaire Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987). The government then filed a motion for summary judgment on the issue of costs. The government sought $269,811.25 in response costs in addition to prejudgment interest on that amount. The $269,811.25 included $52,978.50 in indirect costs,[3] costs paid to contractors, EPA

[2]The removal action entailed neutralizing the caustic acids and sludges, bulking and shipping the liquid acids, excavating and removing the contaminated sewer line, and decontaminating the interior of the building. The property contained, among other substances, 5,400 gallons of waste cyanide, 140 barrels of waste cyanide mix, 3,450 gallons of acid, and 5,000 gallons of waste hypochlorite solution.

[3]As discussed *infra*, this amount represents a reduction from amounts previously sought as indirect costs.

direct payroll and travel expenses, and $35,473.28 in Department of Justice enforcement costs. This motion also was granted with the exception of $993 incurred for a title search[4] and with the proviso that the parties submit further affidavits regarding the appropriate amount of prejudgment interest. *United States v. Northernaire Plating Co.*, 685 F. Supp. 1410 (W.D. Mich. 1988). After the parties stipulated to $74,000.97 as the amount of accumulated prejudgment interest,[5] the court ordered the defendants to pay that amount to the government. On September 2, 1988, the court issued a final judgment on the government's claim. Only Meyer has appealed from that order.

I.

This case comes before us as an appeal from a summary judgment ruling. Our review of such judgments is governed by the principles set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), in which the Supreme Court stated:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

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[4]After disallowing the $993 for the title search, the court ultimately awarded the government $268,818.25 plus $74,004.97 in prejudgment interest, which totals $342,823.22.

[5]In the stipulation, the defendants explicitly preserved their right to appeal the government's entitlement to prejudgment interest.

Id. at 322-23 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986)).

The bulk of Meyer's claims concern the extent of its liability under CERCLA for the government's response action. We shall consider these claims first and begin by examining the applicable statutory authority and language.

CERCLA, 42 U.S.C. § 9601, *et. seq.*, was enacted in December 1980 "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 22, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125. In *Walls v. Waste Resources Corp.*, 823 F.2d 977 (6th Cir. 1987), we noted that CERCLA was intended " 'primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes.' " *Id.* at 981 (citation omitted).[6] CERCLA was reauthorized and amended in 1986 by SARA, Pub. L. 94-499, 100 Stat. 1613 (1986). CERCLA, when originally enacted, established the Hazardous Substance Response Trust Fund, 42 U.S.C. § 9631, to be utilized in connection with the cleanup of releases of hazardous substances into the environment. Section 9631 was repealed by SARA provisions establishing the Hazardous Substance Superfund (Superfund), 26 U.S.C. § 9507. Among other things, the Superfund finances the government's response to actual or threatened releases of hazardous materials. The Superfund's funding sources include general revenue appropriations, certain environmental taxes, monies recovered under CERCLA on behalf of the

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[6]*See generally* Annotation, *Governmental Recovery of Cost of Hazardous Waste Removal Under Comprehensive Environmental Response, Compensation, and Liability Act* (42 U.S.C. §§ 9601, *et seq.*), 70 A.L.R. Fed. 329 (1984 & Supp. 1988).

Superfund, and CERCLA-authorized penalties and punitive damages.

Section 9604(a) of CERCLA authorizes the President of the United States to respond with "remedial" or other "removal" action against any threatened or actual release of any hazardous substance that may pose an imminent and substantial public health threat.[7] Essentially, Congress has authorized the government to utilize Superfund money to take direct response actions that are consistent with the NCP[8] and to recover *all* response costs from all persons responsible for the release of a hazardous substance. 42 U.S.C. § 9607(a). The recovered funds are used to replenish the Superfund. Section 9607(a) provides, in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances

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[7]The President has delegated, in large measure, his authority under CERCLA and SARA to the Administrator of the EPA. *See* Executive Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987), *reprinted in* 42 U.S.C. § 9615 App. at 168-72 (1989).

[8]The National Contingency Plan is described at 42 U.S.C. § 9605 and is set forth at 40 C.F.R. Part 300, *et seq.* That plan sets forth "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants . . . ." 42 U.S.C. § 9605.

> owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

As noted, section 9607(a) authorizes the government to recover all costs of removal or remedial response actions. The statute defines remove or removal as follows:

> The terms "remove" or "removal" means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environ-

> ment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

42 U.S.C. § 9601(23) (footnote omitted). The action authorized by section 9604(b) that is referenced in the definition of remove or removal includes "such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as [the President] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." 42 U.S.C. § 9604(b).

The statute defines remedy as follows:

> The terms "remedy" or "remedial action" means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the

> release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate, and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24).

The term respond or response is currently defined as "remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." *Id.* § 9601(25).

The government submitted to the district court extensive documentation supporting its claim that the defendants owe it $234,337.97 in EPA direct and indirect costs, plus $60,621.99 in prejudgment interest,[9] in addition to

[9]The amount of prejudgment interest sought subsequently was amended to encompass prejudgment interest at a rate to be determined

$35,473.28 in Department of Justice costs. The requested EPA costs were allocated as follows:

$ 22,241.69	- EPA payroll
5,974.70	- EPA travel
153,143.08	- Various contract expenses (including $993 that ultimately was disallowed)
52,978.50	- EPA "indirect costs"
$ 234,337.97	- (Total)[10]

Meyer challenges the government's entitlement to recovery of indirect costs under CERCLA, claiming that administrative costs are recoverable only to the extent they are related to a removal action. Meyer concedes that recoverable expenses include "payroll costs and travel expenses of the EPA personnel directly involved with the Northernaire site removal action, and those of the Justice Department attorneys involved in this cost recovery action . . . [and] *related* administrative costs, as that right is recognized in reported cases." The gist of Meyer's claim is that the government impermissibly is seeking recovery of indirect administrative costs or other costs inherent in operating the Superfund generally. Meyer claims that these costs are not recoverable because they are unrelated to a given removal action at a given site. It contends that the absence of any reference to indirect costs in the statute and legislative history, in the face of the statute's explicit delineation of recoverable costs, supports its claim that indirect costs are not recoverable.

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in the future. The parties ultimately stipulated to $74,004.97 in prejudgment interest.

[10]The court's ultimate award of costs totalling $268,818.25 is comprised of $233,344.97 in allowed EPA costs plus $35,473.28 in Department of Justice costs.

According to William Cooke, a cost accountant with EPA's Superfund Accounting Branch, the $52,978.50 in indirect costs sought by the government represents real costs that are necessary to operate the Superfund Program and to support cleanup efforts at specific sites, but that cannot be linked directly to the efforts at any one particular site. Cooke indicated that the indirect costs essentially are "overhead costs" attributable to "rent and utilities for site and non-site office space; payroll and benefits for program managers, clerical support and other administrative support staff; and pay earned by on-scene coordinators while on leave, or performing tasks not directly associated with a particular site." Cooke described such costs as inherent in all government grants and contracts and as widely recognized and understood in the business community.[11]

The district court approached the indirect costs issue by examining the statutory definition of response at the time of the removal action and as amended by SARA in 1986. At the time of the removal action, response was defined as "remove, removal, remedy, and remedial action." The 1986 amendment added enforcement activities as recoverable costs. 42 U.S.C. § 9601(25). The issue before the district court became whether Superfund administrative costs are encompassed by the cost of removal or remedial action or enforcement activities contemplated by the statute as recoverable. The district court correctly observed the absence of guidance in the legislative history on this issue. The court recognized existing authority for granting administrative, investigative, and legal expenses associated with the cleanup of a site and with any attendant litigation. *See, e.g., United States v. South Carolina Recycling & Disposal, Inc.* (*SCRDI*), 653 F. Supp.

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[11]The EPA produced a manual for fiscal years 1983-86 that explains EPA indirect costs and their allocation and that provides instructions to EPA personnel for calculating indirect costs for purposes of CERCLA cost recovery.

984 (D.S.C. 1984) (government permitted to recover litigation costs, including attorney fees, administrative costs, and investigative costs related to cleanup), *aff'd in part, vacated in part, and remanded, United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); *United States v. Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*), 579 F. Supp. 823 (W.D. Mo. 1984) (recoverable costs include "all litigation costs, including attorney fees . . . salary and expenses . . . associated with . . . monitoring, assessing and evaluating the release of contaminants and the taking of actions to prevent, minimize or mitigate damage which might result from a release or threat of release of contaminants"), *id.* at 851-52 (footnote omitted), *aff'd in part, rev'd in part, and remanded*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). The court also noted, however, that neither *SCRDI* nor *NEPACCO* squarely faced the indirect costs question we confront today. In the one case that considered the question, *United States v. Ottati & Goss*, 694 F. Supp. 977 (D.N.H. 1988), the court denied EPA recovery of indirect costs for rent, utilities, supplies, clerical support, and other "overhead" expenses because those costs were deemed necessary to operate the Superfund program generally and could not be attributed directly to a particular site. The district court here, however, found that because the *Ottati & Goss* court offered no additional explanation for its decision to deny recovery of indirect costs, the case was of limited value.

The court concluded that Congress intended that the government recover "*all* of the costs incurred in a remedial or removal action," and that the language of section 9604(b) together "with the broad remedial purpose of CERCLA, supports a liberal interpretation of recoverable costs." *Northernaire*, 685 F. Supp. at 1419. We agree with this interpretation, finding that the challenged indirect costs are part and parcel of all costs of the removal action, which are recoverable under CERCLA.

Contrary to Meyer's assertions, the challenged indirect costs *are* attributable to its cleanup site in that they represent the portion of EPA's overhead expenses that supported the government's response action on Meyer's property.[12] As such, the government's total response costs necessarily include both direct and indirect costs inherent in the cleanup operation. The EPA demonstrated that its indirect costs for such things as office space for EPA employees who oversee response actions represent costs incurred in support of more than one response action and that are apportioned regionally among all the response actions undertaken in a given region. William Cooke described the method of calculating and allocating indirect costs of the Superfund program to a particular response action. Essentially, the EPA determines, for each fiscal year, the total amount of EPA overhead costs at EPA headquarters and the ten regional EPA offices that support CERCLA response actions. EPA allocates part of the headquarters' overhead costs that support response actions to each of its ten regional offices. Those costs are added to each regional office's own overhead costs that support such actions. EPA then calculates an indirect cost rate for each region each fiscal year by dividing the region's total overhead costs attributable to Superfund activities, plus its share of headquarters' overhead costs, by the total number of hours billed by regional Superfund personnel in a given fiscal year. To determine what portion of its indirect costs support a particular response action, EPA multiplies the number of hours billed by certain regional personnel to a particular response action by the indirect cost rate for that fiscal year. Finally, to determine the total indirect costs attributable to a particular response site, EPA adds the indirect costs attributed to

[12]Although Meyer claims that EPA's indirect costs are unrelated and unattributable to the government's removal action, the government affidavits suggesting otherwise were not challenged by affidavit or other evidence offered by Meyer.

that site for each year during which response action occurred at that site. According to the government, the $52,987.50 sought in indirect costs represents the portion of EPA overhead costs attributable to the response action on Meyer's property, which must be added to the government's direct costs to determine the EPA's total cost of the removal action. The use of direct and indirect costs in calculating total cost comports with standard accounting practices[13] and reflects the true overall cost incurred by the government in cleaning up Meyer's property.

Given section 9607(a)'s authorization for the government to recover *all* costs of its removal or remedial actions,[14] we are not persuaded that the government's indirect costs were unauthorized. Rather, to the extent cleanup actions are necessary, we are persuaded that the statute contemplates that those responsible for hazardous waste at each site must bear the *full* cost of cleanup actions and that those costs necessarily include both direct costs and a proportionate share of indirect

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[13]*See* C. HORNGREN & G. FOSTER, COST ACCOUNTING: A MANAGERIAL EMPHASIS 20-36 (6th ed. 1987).

[14]The district court in *NEPACCO* described recoverable response costs as extremely broad and as including:

> (a) Investigations, monitoring and testing to identify the extent of danger to the public health or welfare or the environment.
>
> (b) Investigations, monitoring and testing to identify the extent of the release or threatened release of hazardous substances.
>
> (c) Planning and implementation of a response action.
>
> (d) Recovery of the costs associated with the above actions, and to enforce the provisions of CERCLA, including the costs incurred for the staffs of the EPA and the Department of Justice.

579 F. Supp. at 850. Arguably, the indirect costs allocated to Meyer represent costs *associated with* the cleanup of Meyer's property.

costs attributable to each site. In essence then, the allocation of the indirect costs to specific cleanup sites effectively renders those costs direct costs attributable to a particular site. We are confident that had Meyer or the other defendants undertaken the cleanup operation by contracting with another company to perform the cleanup, the costs of that cleanup, whether characterized as costs, direct costs plus indirect costs, or otherwise, would include the type of indirect costs challenged here. The fact that the government's indirect costs may be higher than another entity's does not make those costs any less recoverable, particularly in view of the defendants' failure to handle the cleanup on their own. We are not persuaded that the challenged indirect costs are unrelated or unattributable to the removal action on Meyer's property and conclude that the district court properly found those costs recoverable.

Meyer also claims that, even if the EPA is authorized to recover indirect costs, material issues of fact regarding those costs should have precluded summary judgment. In making this claim, Meyer does not dispute the fact that it offered no opposing affidavits to the government's claim for indirect costs. Rather, Meyer claims that because of changes in the amount of indirect costs sought by the government and because of the complexities involved in calculating such costs, the government failed to sustain its burden of proving the absence of any genuine issues of material fact regarding those costs. The government presented various documents supporting its claim for indirect costs. As previously noted, Cooke's affidavits clearly set out how the EPA indirect costs are calculated. Moreover, Richard Hackley, an accountant for the Superfund, explained the basis for the EPA's reductions in the amount sought as recoverable indirect costs.[15]

[15]Hackley reduced an original figure of $88,301 in indirect costs to $53,397 to reflect the fact that the EPA no longer included in its calcula-

Although Meyer had ample opportunity to engage in discovery or otherwise to acquire evidence to support its claim that a genuine issue of material fact existed, it failed to do so. Based on the documents before it, the district court properly determined that no genuine issue of material fact existed regarding indirect costs. Accordingly, summary judgment for the government properly was granted.

II.

We next consider Meyer's claim that the district court erred in applying retroactively the SARA amendment to CERCLA that authorized the government to recover prejudgment interest.[16] This amendment took effect approximately six months prior to the district court's award of prejudgment interest in this case, but after the removal action undertaken by the government and the commencement of this suit.

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tion of indirect costs hours charged to a particular site by employees of the Office of Regional Counsel, Office of Public Affairs, and the Planning and Management Division. The $53,397 subsequently was reduced to $52,978.50 because the former figure was subject to a provisional indirect cost rate while the latter figure reflected the application of the final rate.

[16]SARA amended the section 9607(a) provisions on liability to authorize prejudgment interest. The amended provision provides, in pertinent part:

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. . . .

42 U.S.C. § 9607(a).

Meyer acknowledges the general rule that a court is obliged to apply the law in effect at the time of its decision, *Bradley v. Richmond School Board,* 416 U.S. 696 (1974), but notes that an exception to the general rule exists when such application would cause manifest injustice or is contrary to statutory authority or legislative history. *Id.* at 711. Meyer claims that because the amendment in question explicitly provided for an effective date of October 17, 1986, Congress did not intend the amendment to be applied retroactively. Additionally, Meyer claims that it should have had the opportunity to demonstrate that the amendment's expansion of Meyer's potential liability would result in manifest injustice. Meyer also claims that genuine issues of material fact surrounded the propriety of the prejudgment interest award. In particular, Meyer claims that because it has not been "recalcitrant, deceptive or unreasonable," *SCRDI,* 653 F. Supp. at 1009, or otherwise delayed the cleanup action or subsequent litigation, the prejudgment interest award was inappropriate.

These claims do not persuade us that the district court erred in awarding the government prejudgment interest. For one, the district court's denial of prejudgment interest in *SCRDI* was vacated in view of SARA's intervening authorization of prejudgment interest. Therefore, the case was remanded for reconsideration of the prejudgment interest issue. *Monsanto,* 858 F.2d at 176. Although it is true that Congress gave no clear indication as to whether SARA should be applied retroactively, we do not view SARA's provisions in isolation. Rather, the legislative history indicates that SARA was intended to "revitalize the Superfund program to permit substantial progress in addressing one of our most pressing environmental problems—the protection of the public from hazardous chemical substances." H.R. Rep. No. 99-253(I), 96th Cong. 2d Sess. 54, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2836. Moreover, the legislative history to SARA's provisions on liability indicates that the amendments are intended to *clarify* that all

response costs are recoverable from responsible parties and notes that section 9607 "gives the [EPA] Administrator authority to obtain prejudgment interest in all cost recovery actions." *Id.* at 73, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2855. We do not read the statutory or legislative history governing prejudgment interest as evincing congressional intent to postpone its application. *Accord Monsanto,* 858 F.2d at 175 ("the language and legislative history of the 1986 amendment [authorizing prejudgment interest] reveal no statutory direction or congressional intent to delay its application").

We also note that in *NEPACCO,* 810 F.2d 726, the retroactivity of CERCLA was considered. The court applied CERCLA retroactively despite CERCLA's proclaimed effective date of December 11, 1980, the alleged absence of language in CERCLA's liability provisions or legislative history supporting retroactive application, or the fact that CERCLA imposed a new kind of liability. The court, noting section 9607's reference to proscribed conduct in the past tense, found that Congress intended CERCLA to apply retroactively despite the absence of express provisions in CERCLA authorizing such application. *See also United States v. Hooker Chemicals & Plastics Corp.,* 680 F. Supp. 546 (W.D.N.Y. 1988) (finding CERCLA retroactive). Because we view SARA as reauthorizing and clarifying the congressional intent underlying CERCLA, because of CERCLA's retroactive application, and because of the broad remedial purposes underlying CERCLA and SARA, we do not believe that Congress would have intended SARA's prejudgment interest provisions only to have prospective effect.[17] The prejudgment interest provisions apply to "[t]he amounts recoverable in

[17]SARA became effective six months prior to the district court's decision. Therefore, SARA can be deemed to have been applied retroactively in this case only if liability determinations occur when a cleanup action has been completed and the cost-recovery suit has commenced.

an action under this section," 42 U.S.C. § 9607(a), a section that itself has been given effect retroactively. We decline to interpret SARA's effective date as a limitation on its retroactive application. *Accord United States v. Rohm and Haas Co.*, 669 F. Supp. 672 (D.N.J. 1987) (applying SARA's judicial review provisions retroactively). *See also United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1075 (D.Colo. 1985) (applying CERCLA retroactively); *NEPACCO*, 810 F.2d 726, 732 (applying CERCLA retroactively).

Finally, Meyer has not indicated, in any way, how retroactive application of the amendment would result in manifest injustice. Therefore, we find no reason for the district court to have deviated from its obligation to apply the law in effect at the time it rendered its decision. We also note that even before SARA expressly authorized it, the district court had discretion to award prejudgment interest. *See NEPACCO*, 579 F. Supp. at 852 (awarding prejudgment interest pre-SARA); *see also SCRDI*, 653 F. Supp. 984, 1009 (noting that "some CERCLA actions may present circumstances in which an award of prejudgment interest is appropriate," and that absent statutory provision on prejudgment interest, matter is to be resolved by courts). As noted, the district court's ruling denying prejudgment interest in *SCRDI* was vacated and the case was remanded for reconsideration in view of SARA's authorization of recovery of prejudgment interest. In the present case, the district court found that the award was necessary to make the United States whole for interest losses incurred by expenditures from the Superfund to clean up Meyer's property. Finding no errors of law or genuine issues of material fact surrounding the prejudgment interest issue, we conclude that the district court properly granted summary judgment for the government on this issue.

III.

Meyer's claim that the district court erred in finding the defendants jointly and severally liable for the cost of the

removal action also fails. In pertinent part, CERCLA provides for liability of the following persons or entities:[18]

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . .

42 U.S.C. § 9607(a)(1), (2). Owner or operator is defined, in pertinent part, as "any person owning or operating [an onshore or offshore] facility . . . ." 42 U.S.C. § 9601(20)(A). The term facility is defined, in pertinent part, as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id. § 9601(9)(A), (B). The parties do not dispute that Meyer owned the property while Garwood operated the Northernaire electroplating business. The leading case on the issue of joint and several liability under CERCLA is *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). *Chem-Dyne* explicitly is recognized and endorsed in the legislative history to SARA regarding CERCLA's liability provisions.[19]

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[18]Such liability is subject to certain defenses set forth in 42 U.S.C. § 9607(b), which are not applicable here.

[19]*See* H.R. Rep. No. 99-253(I), 99th Cong., 1st Sess. 74, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2856 ("nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court").

In *Chem-Dyne*, the court noted that although CERCLA does not provide explicitly for joint and several liability of responsible parties, Congress intended for the scope of liability under CERCLA to be determined in accordance with "traditional and evolving principles of common law." *Id.* at 808. As such, the court stated that "where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm," *id.* at 810 (citing RESTATEMENT (SECOND) OF TORTS § 875), and the responsible parties have the burden of proving the divisibility of the harm. *Id.* In accordance with these principles, CERCLA has been interpreted to impose joint and several liability when the environmental harm is indivisible, *see Monsanto*, 858 F.2d at 171-73, and to allow for apportionment when two or more persons independently are responsible for a single harm that is divisible. *Id.* at 171.

In this case, the district court made a factual determination that the environmental harm created by the conditions on Meyer's property was indivisible, 670 F. Supp. at 748. We decline to disturb this finding because it is not clearly erroneous. *See Taylor & Gaskin, Inc. v. Chris-Craft Indus.*, 732 F.2d 1273 (6th Cir. 1984). The court noted that although the basis for each defendant's liability differed, the harm, *i.e.*, the presence of hazardous materials at the Northernaire facility, was the same. Meyer's liability pursuant to 42 U.S.C. § 9607 was predicated on ownership of the land, notwithstanding the fact that Garwood and Northernaire, as operators of the facility, directly were responsible for the presence of the hazardous substances on Meyer's property. We agree with the district court that CERCLA contemplates strict liability for landowners, who, absent a defense recognized under section 9607(b), are deemed responsible for some of the harm. *See Monsanto*, 858 F.2d at 168 ("The plain language of [section 9607(a)(2)] extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste."); *see also New York v. Shore Realty Corp.*,

759 F.2d 1032 (2d Cir. 1985). The district court also noted, however, that CERCLA permits actions for contribution among parties found jointly and severally liable for environmental harm. *Northernaire*, 670 F. Supp. at 748. This observation is supported by the legislative history to SARA, which provides, in pertinent part:

> This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.

H. Rep. No. 99-253(I), 99th Cong. 2d Sess. 79, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2861. To the extent that Meyer can demonstrate the divisibility of the harm and that it paid more than its fair share, it will be entitled to relief in its action for contribution currently pending against the other defendants. Accordingly, we conclude that the district court did not err in finding the defendants jointly and severally liable.

IV.

Meyer also urges that genuine issues of material fact existed so as to preclude summary judgment. We already have rejected those arguments with respect to the issues of indirect cost and prejudgment interest. We briefly address Meyer's claim relative to the issues of compliance with the National Contingency Plan and of direct costs.

The government's costs are recoverable to the extent they are not inconsistent with the NCP. 42 U.S.C. § 9607(a)(4). As noted, Meyer bears the burden of demonstrating that the costs sought under CERCLA's liability provisions are inconsistent with the NCP. Section 9605(7) of CERCLA directs that the NCP require remedial action to be cost effective. To prevail on its claim that the EPA's costs were inconsistent

with the NCP, Meyer had to demonstrate that the EPA's decision to incur the challenged costs was "arbitrary or capricious." *See NEPACCO,* 810 F.2d at 748. To that end, Meyer claims that a $140,419 cleanup contract awarded to Petrochem without competitive bidding was arbitrary and capricious.

Although 41 U.S.C. § 253 imposes a competitive bidding requirement for federal contracts, section 253(c)(2) establishes an exception for public exigencies. In claiming that the environmental conditions on Meyer's property did not pose a public exigency, Meyer relied on various 1983 government documents indicating that immediate action was not warranted. Those documents indicated that cleanup operations could wait six months because the site did not pose an immediate threat to human health or the environment. The court, in resolving this issue, however, noted additional government affidavits indicating that competitive bidding is a time-consuming process averaging nine to twelve months and that the conditions of various rusted drums containing cyanides and acids on Meyer's property, noted in the 1983 documents, could cause severe injury and death to persons coming in contact with them. Meyer did not respond to or otherwise challenge these factual assertions.

Under these facts, the district court concluded that the EPA did not act arbitrarily and capriciously by electing to forego competitive bidding by characterizing Meyer's property as imminently dangerous. We agree that Meyer failed to demonstrate that the government's actions were inconsistent with the NCP or, otherwise, to raise a genuine issue of material fact regarding the propriety of the government's decision to forego competitive bidding. The fact that a cleanup operation can occur within six months rather than immediately does not render the potential danger from the release of hazardous substance insignificant. Rather, the government must organize its response efforts in accordance with the severity of the danger posed. In any case, it was reasonable for the dis-

trict court to conclude that, in this case, competitive bidding would have jeopardized the goal of completing the cleanup of Meyer's property within six months.

As for the government's direct costs, we note that rather than offering evidence to counter or otherwise challenge the extensive government documentation of its direct costs, Meyer only raises vague challenges to the validity of those costs based on the government's evidence. In so doing, Meyer has failed to demonstrate a genuine issue of material fact regarding the government's direct costs. Accordingly, summary judgment for the government on this issue also was appropriate.

The district court's judgment is **AFFIRMED** in all respects.

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

NORTHERNAIRE PLATING CO.,
WILLARD S. GARWOOD and
R.W. MEYER, INC.,

Defendants and
Third-Party Plaintiffs,

-vs-

CITY OF CADILLAC,

Third-Party Defendant
and Fourth-Party
Plaintiff,

-vs-

R.W. MEYER, JR., R.W. MEYER SR.,
Individually and d/b/a R.W. MEYER
CONSTRUCTION COMPANY,

Fourth-Party Defendants.
_____/

Case No. G84-1113 CA7

OPINION

Entered May 6, 1988

The facts of this case are detailed in United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987). In that opinion, this court found the original defendants Willard Garwood, Northernaire Plating Co. ("Northernaire"), and R.W. Meyer, Inc. ("Meyer") jointly and severally liable to plaintiff for the cost of removing hazardous substances from a site in northern Michigan under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA" or ("the Act"). 42 U.S.C. § 9607(a). Presently before the court are plaintiff's motion for summary judgment on costs and plaintiff's motion to strike jury demand.

I. Plaintiff's Motion to Strike Jury Demand

Defendant Meyer filed a jury demand along with its answer to plaintiff's complaint. Plaintiff's action for recovery under CERCLA is an equitable action, seeking "restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances." United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 749 (8th Cir. 1986) (hereinafter "NEPACCO"), cert. denied, 108 S.Ct. 146 (1987); Maryland Casualty Co. v. ARMCO, Inc., 822 F.2d 1348 (4th Cir. 1987), cert. denied, 108 S.Ct. 703 (1988). Defendant does not have a right to a jury trial of plaintiff's claim for equitable relief.

NEPACCO, supra; see also Tull v. United States, 107 S.Ct. 1831, 1835 (1987) (discussing absence of right to jury trial in equitable actions). Therefore, plaintiff's motion to strike jury demand, to which defendant Meyer has never responded, is granted.

II. Plaintiff's Motion for Summary Judgment on Costs

CERCLA authorizes the EPA "to take direct 'response' actions which can include either short-term 'removal' actions or long-term 'remedial' actions or both, pursuant to the [national contingency plan], with funds from the 'Superfund,' and to seek recovery of response costs from responsible parties pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, in order to replenish the Superfund." NEPACCO, 810 F.2d at 731 (footnote omitted). Although this

court has already determined that defendants Garwood, Northernaire, and Meyer are liable to the United States for its costs incurred relating to the removal action at the Northernaire site, the court now must determine how much defendants must pay. Prior to 1986, 42 U.S.C. § 9607(a)(4) provided:

> [A]ny person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --
>
> (A) all costs of removal or remedial action incurred by the United States Government or a state not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

Plaintiff, seeking to resolve the question of how much is owed without trial, has submitted

documentary evidence which, plaintiff argues, demonstrates that defendants owe plaintiff $234,337.97 in costs incurred by the Environmental Protection Agency ("EPA"), $60,621.99 in prejudgment interest on those EPA costs, and $35,473.28 in costs incurred by the Department of Justice. The most recent cost summary submitted by the plaintiff breaks down the EPA costs as follows: $22,241.69 for EPA payroll; $5,974.70 for EPA travel; $11,641.08 for a contract with "Weston"; $140,419.00 for a contract with "Petrochem"; $993.00 for a contract with "GCA".; $90.00 in miscellaneous expense to "Weston"; and $52,97 .50 "indirect cost."[1]

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[1] Plaintiff's motion originally requested $22,113 in payroll expenses, (continued...)

Defendants Meyer, Northernaire, and Garwood have filed two briefs in opposition to plaintiff's motion for summary judgment on costs. Defendants raise three reasons which they argue preclude this court from granting plaintiff's motion: 1) plaintiff's costs were inconsistent with the national contingency plan ("NCP")

(...continued)
$53,397 in indirect costs, and $6,825 in travel costs. Plaintiff later modified these requests according to the documents and affidavits filed with the court. In addition, plaintiff supplemented its original request for "prejudgment interest at a rate to be determined later," with a request for the specific amount of interest noted above, $60,621.99. This $60,622 in interest is calculated for the EPA costs alone. Because plaintiff's motion sought interest on all costs, including those incurred by the Department of Justice, the court assumes that by subsequently specifying the amount of interest on the EPA costs, plaintiff is not thereby withdrawing its request for prejudgment interest on non-EPA costs.

because plaintiff failed to collect and maintain sufficient documentation of costs and because plaintiff's expenses were not cost-effective; 2) genuine issues of fact remain concerning whether or not certain costs were actually incurred; and 3) plaintiff is not entitled to recover "indirect costs" or prejudgment interest under Section 9607.

A. Standard for Summary Judgment

Plaintiff's motion for summary judgment is governed by Federal Rule of Civil Procedure 56. Plaintiff, as movant, carries the burden of demonstrating that no genuine issue of material fact remains and that it is entitled to judgment as a matter of law. Under Rule 56(e), however, defendants may not rest on their

pleadings, but must set forth specific facts showing that there is a genuine issue for trial. The standard under Rule 56 mirrors the standard for directed verdict: "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2515 (1986). The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences from the record in favor of the party or parties opposing the motion, in this case, defendants. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Smith v. Hudson, 600 F.2d 60, 64 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979).

Defendants Garwood and Northernaire request the court deny summary judgment until "further information is obtained" about costs. Specifically, defendants state they wish to engage in further depositions to obtain facts to oppose plaintiff's motion. Before deciding a motion for summary judgment, this court "must provide both parties an opportunity to conduct some discovery." Vega v. First Federal Savings & Loan Assn. of Detroit, 622 F.2d 918, 926 (6th Cir. 1980); Balderback v. City Natl. Bank & Trust Co., 639 F.2d 331, 332 (6th Cir. 1981). In Vega, the Sixth Circuit reversed an entry of summary judgment involving costs, stating that the "opportunity for discovery is even more critical in cases . . . where [one

party] possesses all of the relevant information. Only through discovery can it be determined whether a material factual issue exists which precludes summary judgment." Id.

Here, as in Vega, one party, plaintiff, possesses most, if not all of the information concerning its costs. However, unlike Vega, there are no discovery disputes pending in this case, nor have defendants been "denied the opportunity to pursue relevant avenues of inquiry concerning the . . . costs. . ." Id. This case was filed in September of 1984, three and one-half years ago. Nearly a year has passed since this court found defendants liable, and over seven months have passed since plaintiff filed its motion for summary judgment on costs. It

appears from the record that since that time some discovery has taken place concerning the cost issue. Defendants have had an adequate opportunity to depose those people whom they wished to depose. See also United States v. South Carolina Recycling & Disposal, Inc., 653 F.Supp. 984, 1007-08 (D.S.C. 1984) (hereinafter "SCRDI") (United States' motion for summary judgment on costs granted when supported by cost summaries and affidavits as here, and defendants given approximately three months for discovery of cost information).

Moreover, defendants have not moved for continuance under Fed. R. Civ. P. 56(f). Rule 56(f) authorizes a court to order a continuance to permit further discovery rather than grant a

motion for summary judgment, if it appears from the opponents' affidavits suggesting they are unable to present essential facts. See Anchor Motor Freight v. International Brotherhood of Teamsters, 700 F.2d 1067, 1061 (6th Cir.), cert. denied, 464 U.S. 819 (1983). Plaintiff's summary judgment motion on costs is ripe for consideration and is an appropriate method to resolve the pending cost issues in this case. SCRDI 635 F. Supp. at 1006-07.

B. Consistency with the NCP

Under 42 U.S.C. 9607(a)(4), the United States may recover costs "not inconsistent with the national contingency plan." The NCP is described in 42 U.S.C. § 9605 and promulgated in 40 C.F.R. §§ 300.1-.86

(1987). While a defendant in a CERCLA action may raise inconsistency with the NCP as a defense to an action for costs, United States v. Outboard Marine Corp., 789 F.2d 497 (7th Cir.), cert. denied, 107 S.Ct. 457 (1986), the defendant carries the burden of showing the costs sought under Section 9607 are inconsistent with the plan. NEPACCO, 810 F.2d at 747-48.

1. Compliance with 40 C.F.R. 300.69

Defendants raise two different issues of non-compliance with the NCP. First, defendants Northernaire and Garwood claim that plaintiff failed to collect and maintain sufficient documentation supporting the costs as required by 40 C.F.R. § 300.69 (1987). This section of the NCP provides, in pertinent part:

> During all phases of response, documentation shall be collected and maintained to support all actions taken under this Plan, and to form the basis for cost recovery. In general, documentation shall be sufficient to provide the source and circumstances of the condition, the identity of responsible parties, accurate accounting of Federal or private party costs incurred, and impacts and potential impacts to the public health and welfare and the environment.

Defendants state that plaintiff has failed to present information concerning the availability of lower bids, and argue that the documents plaintiff produced during discovery concerning contract awards, cost summaries, and EPA payroll reports failed to "support all actions taken under this Plan."

In explaining what documentation is required, the regulation provides that the

documentation be "sufficient to provide . . . accurate accounting of Federal . . . costs incurred." Plaintiff has submitted documentation detailing the source and computation of each cost item requested. Defendant Meyer has submitted even more government documents concerning costs, presumably obtained from plaintiff. I conclude that defendants Garwood and Northernaire have not shown plaintiff's actions were inconsistent with 40 C.F.R. § 300.69.

2. Compliance with 40 C.F.R. § 300.68

Second, defendants protest the failure of plaintiff to take cost-effective remedial action. Section 9605(7) of CERCLA provides that the NCP shall include "means of assuring that remedial action measures

are cost-effective over the period of potential exposure to the hazardous substance or contaminated materials . . . ." The term "cost-effective" was defined in the NCP during 1983 to 1985 to be "the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment." 40 C.F.R. § 300.68(j)(1985); NEPACCO, 810 F.2d at 748. A defendant may meet the burden of showing that an expense is too costly to be consistent with the NCP only by demonstrating that the agency's decision to incur that cost was arbitrary and capricious. NEPACCO, 810 F.2d at 748. The deference with which courts review such decisions

recognizes that "determining the appropriate removal and remedial action involves specialized knowledge and expertise," id., consideration of "numerous scientific factors," and balancing "cost with feasibility and adequacy of remedy." United States v. Ward, 618 F. Supp. 884, 900 (D.N.C. 1985); see also, 42 U.S.C.A. § 9613(j) (West Supp. 1987) (1986 amendment stating decision in selecting response action will be upheld unless objecting party can demonstrate the decision was arbitrary and capricious or not in accordance with law); House Reports No. 99-253 (III and V) on the Superfund Amendments of 1986, reprinted in 1986 United States Code Congressional and Administrative News 3047-48, 3149.

With these standards in mind, the court will address each action that defendant argues was not cost-effective. First, defendant argues that plaintiff's decision to award the cleanup up contract to Petrochem Services, Inc., ("Petrochem") without competitive bidding was "arbitrary and capricious" and not cost-effective. At the time the United States contracted with Petrochem for the cleanup of the Northernaire site, federal law provided that "[a]ll . . . contracts for property and services shall be made by advertising, as provided in section 303 [41 U.S.C. § 253], except that such purchases and contracts may be negotiated by the agency head without advertising if -- . . . the public exigency will not admit

of the delay incident to advertising . . . ." 41 U.S.C. § 252(c) (1974), amended by 41 U.S.C.A. § 252 (West Supp. 1987). Both parties agree that plaintiff awarded a contract to Petrochem without advertising. The EPA found that "the release of . . . hazardous substance(s) presents an imminent and substantial threat to the public health and welfare," and that formal advertising "could delay the emergency response action necessary to remove the hazardous substance(s) or to prevent the release of such substance(s) which, upon exposure, may cause death, disease, or illness."

Meyer argues that this finding is inaccurate, that there was no imminent or substantial threat to the public health or welfare which would

require abandonment of the formal bidding process. Meyer refers to the July 1982 memo of Robert Bowden, Chief of the Spill Response Section of the EPA, in which Bowden states that there is no emergency at the Northernaire site, a March 1983 memo from the on-scene coordinator George Madany, stating that no immediate removal is warranted, and an April 1983 report which also states that the site was not an immediate threat to human health or the environment and the cleanup operations could wait six months. Meyer charges that the EPA could have started the bidding process in 1982, and, alternatively, that no emergency existed in 1983 which required circumvention of advertising requirements.

Robert Bowden, Chief of the Spill Response Section of the EPA, explains in his second affidavit that the process of awarding a contract through competitive bidding is very time consuming, taking, normally, nine to twelve months. The March 1983 memo on which defendants rely also stated that the "tanks and drums" containing acids and cyanides "are badly rusted." Certain vats, the report concluded, "appeared capable of holding the contents for a few months longer." Mr. Bowden, in his affidavit, also states that "if the acids and cyanide came into contact, the resulting reaction would form hydrogen cyanide gas," which "could result in severe injury or even death to persons in the area."

Defendants do not dispute these factual assertions.

Meyer and the government both rely on the same reports, memos, and letters to provide the factual basis for their conclusions. Rather than raising a genuine issue of fact, Meyer disputes the propriety of the agency's decision, a question of law to be decided by the court under an arbitrary and capricious standard. Given the risk of death or injury should the tanks leak, agreement by the authors of the March 1983 memo and the April 1983 report that removal action was needed within six months, and the nine to twelve month time period necessary to let the removal contract for competitive bidding, I conclude that the EPA did not act arbitrarily or

capriciously by characterizing the site as imminently threatening or by choosing to by-pass competitive bidding.

Meyer charges that the "extremely high" amount that Petrochem billed the EPA per day "certainly creates a question of cost effectiveness." Defendant has not produced any evidence suggesting that plaintiff had a more cost effective alternative to the Petrochem contract. Defendant's conclusory allegations do not demonstrate plaintiff's decisions were arbitrary or capricious.

Meyer also challenges the $993 that the EPA paid GCA Corporation to perform a title search on the Northernaire property. Meyer submits a memo which disapproves a plan submitted

by GCA to do the work for $2,289 and notes that the work could be done by the Wexford County abstract office at an estimated cost of $120.00. Both parties agree that EPA went on to pay GCA $993 for the work. Meyer objects to reimbursing the government $993 for a job which the EPA had earlier acknowledged could have been finished for $120. Defendant's proof tends to show that an official at one time believed there was a cheaper alternative to GCA's first offer, and precludes summary judgment on this particular cost.

Defendant questions plaintiff's decision to send more than one attorney to proceedings on this case and more than one EPA employee to negotiations on the Northernaire site. Congress has

provided that the plaintiff in a CERCLA action may recover "all costs" not inconsistent with the NCP. 42 U.S.C. § 9607. These costs include attorney's fees and reimbursement for costs incurred by the Department of Justice. United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984), aff'd, 810 F.2d 726 (1986), cert. denied, 108 S.Ct. 146 (1987); SCRDI, 653 F. Supp. at 1009. Costs that are not inconsistent with the NCP "are conclusively presumed to be reasonable." NEPACCO, 810 F.2d at 748. Agencies' choices concerning negotiation and litigation strategy do not involve the type of scientific and public health concerns involved in the choice of that removal action to take.

Litigation and related activities, therefore, may not deserve the same deferential arbitrary and capricious review that is applied to the agencies' choice of cleanup remedy. However, in reviewing any agency response decision for cost effectiveness under the NCP, the burden remains on the defendant to show that the agencies' action was not cost effective. Merely raising the question of why more than one person attended certain proceedings does not meet this burden.

C. Factual Disputes over Certain Costs

Defendant Meyer argues that the invoices from Petrochem total only $113,880.21, not the $140,419 billed. The cost summary for the Petrochem contract shows two invoices, No. 33313 for $136,285.87 and No. 33133 for

$4,133.13. These invoices total $140,419.00, the amount that Ms. Pipkin, a program analyst for the government, states in her affidavit was the total cost of the Petrochem contract. No evidence suggesting a lesser amount was actually paid or billed appears in the record. No genuine issue of fact remains regarding the amount plaintiff paid to Petrochem.

Defendant objects that plaintiff improperly allocated the total travel costs for Northernaire and another site to the Northernaire site alone. Defendant attached travel reports, vouchers, or authorizations for five trips: December 1982; February 1983; March 1983; April 3, 1984; and April 12, 1984. These documents show that each trip pertained

to at least one other site in addition to the Northernaire site. In his affidavit submitted in response to Meyer's brief, Richard D. Hackley, an accountant with the EPA, states that only half of the expense of the December 1982 trip was attributed to Northernaire. Mr. Hackley states that cost of the April 3, 1984, trip has been deleted from the amount sought by the government. The cumulative summary of travel costs dated October 14, 1987, notes that only one-fourth of the March 1983 trip and only half of the April 12 trip were charged to the Northernaire site. Although Mr. Hackley does not specifically address the allocation of costs among sites for the February 1983 trip, he states in his second affidavit that he has again reviewed the cost

data and believes that the cost data "represents a fully accurate statement of all costs through May 11, 1987 . . ., associated with the Immediate Removal Action at the Northernaire site." Given this record, no genuine issue of fact remains concerning the propriety of plaintiff's allocation of travel costs.

Defendant objects to plaintiff's demand for $2,730 of its payroll expenses, incurred as late as two years after the removal action. These expenses are documented in exhibits attached to plaintiff's brief along with all other payroll expenses requested by plaintiff. Plaintiff represents that after the removal action, payroll expenses were incurred preparing for litigation and

documenting costs. Defendant has not presented any evidence from which a fact finder could infer that these payroll costs were not related to the removal action or were excessive or inconsistent with the NCP. In a CERCLA action, plaintiff is entitled to all recovery costs, including attorney fees and litigation expenses incurred by the staffs of the EPA and the Department of Justice. United States v. Northeastern Pharmaceutical & Chemical Co., 579 F.2d Supp. 823 (W.D. Mo. 1984), aff'd, 810 F.2d 726 (1986), cert. denied, 108 S.Ct. 146 (1987).

Defendants Northernaire and Garwood object to the $35,473 requested in Department of Justice costs. Defendants argue that the plaintiff has presented no evidence of, and the

defendants have no way of verifying, specific Department of Justice expenses. In his affidavit, however, Philip Stinnes, Deputy Executive Assistant in the Executive Office of the Land and Natural Resources Division at the United States Department of Justice, explains that the Department's cost figure was calculated not by adding up each and every specific cost accumulated in litigating this case, but by figuring, on an annual basis, what portion of the Department's total costs were to be allocated to this case.

Mr. Stinnes states that the total amount charged to the Superfund account by the Lands Division of the Department is determined by multiplying each total Lands Division cost

(printing, freight, etc.) by the ratio between the professional hours devoted to Superfund cases, including this case, and total Division professional hours. For the years in question here, this ratio of Superfund hours to total hours ranged from 19 to 27 percent. The portion of Lands Division costs allotted to Superfund cases were then charged to the Superfund account. To arrive at the Department's Superfund costs for this particular case, the Department then prorated the total Superfund costs by the percentage of professional hours actually spent on this case. The percentage of professional hours spent on the Northernaire case of all Superfund professional hours in the Lands

Division ranged from .027 to .38 percent annually.

Thus, defendants' objection to lack of documentation for all $35,473.28 fails to raise a genuine issue of material fact necessitating trial. Defendants have not presented any evidence to this court that suggests that the Department's cost figure for this case, or the Department's method of computing that figure, is unreasonable or inaccurate.

D. Indirect Costs

Defendant Meyer maintains that the EPA's "indirect costs" are not recoverable. Mr. Cook, cost accountant with the Superfund Accounting Branch of the EPA, stated in an affidavit that the EPA's "indirect costs" for this case amounting to $52,978.50, "are

costs which are necessary to the operation of the program and support of site clean up efforts, but which cannot be directly identified to the efforts of any one site." Mr. Cook likens indirect costs to "overhead costs," and states that they are "such things as rent and utilities for site and non-site staff office space; payroll and benefits for program managers, clerical support and other administrative support staff; and pay earned by on-scene coordinators while on leave, or performing tasks not directly associated with a particular site." These costs, he continues, are "generally understood and accepted within the business community, and are recognized as costs to the Agency in all government grants-and contracts."

The total indirect cost figure sought here is the result of multiplying the number of EPA personnel hours charged to the site, by the cost rate for each specific ear in that Region. In 1983, that rate was $72 per hour, n 1984 it was $61, in 1985 it was $53 and in 1986 it was $51 per hour. The plaintiff calculated indirect costs for 1987 and 1988 using a provisional rate of $51 per hour.

Under Section 9607, defendants are liable for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the [NCP]." At the time of the removal action in this case, Section 9601(25) defined "response" as "remove, removal, remedy, and remedial action." In 1986,

Congress added the following clause to this definition: "all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25) (emphasis added). Thus, in order to determine the recoverability of indirect costs, the court must decide whether Congress intended that Superfund's administration costs were costs of "removal or remedial action," or using the 1986 amendment as a guide, costs of "enforcement activities" "related" to the "removal" or "remedial" action in this case. The Act defines "Removal" to include:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such

actions as may be necessary to monitor, assess, and evaluate the release of threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act . . . .

42. U.S.C. § 9601 (23) (emphasis added).

The activities authorized by Section 9604(b) include

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the

release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be

> necessary to protect the public health or welfare. . . .

Although these provision read as if they pertain to a particular site and not to all sites generally, Congress clearly intended that the United States recover all of the costs incurred in a remedial or removal action. The language of Section 9604(b), combined with the broad remedial purpose of CERCLA, supports a liberal interpretation of recoverable costs. "'Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.'" Walls v. Waste Resource Corp., 823 F.2d 977, 980 (6th Cir. 1987) (quoting United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D.

Minn. 1982)). The Sixth Circuit has stated that it "'will not interpret Section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise.'" Id. at 981 (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2nd Cir. 1985)).

The legislative history is silent, and the case law sparse on the precise issue of the recoverability of EPA's "indirect costs." In SCRDI, supra, the court granted "administrative, investigative, and legal expenses associated with the cleanup" and the "litigation." 653 F. Supp. at 1007-09 (D.S.C. 1985) (awarding $1,065,910.92 in federal costs and $93,000 in state

administrative expenses). In United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823 (W.D. Mo. 1984), aff'd, 810 F.2d 726, cert. denied, 108 S.Ct. 146 (1987), the court found defendants liable for "all costs, including salaries and expenses, incurred by plaintiff associated with such activities as monitoring, assessing and evaluating the release of contaminants and the taking of actions to prevent, minimize or mitigate damage which might result from a release of contaminants from the Denny farm site." Id. at 851-52 (emphasis added). Because neither the opinion in NEPACCO, nor the opinion in SCRDI, specify whether or not the costs granted included the type of "indirect costs" that the EPA seeks in this case, these

cases do not provide specific guidance on the decision at issue in this case.

There is one very recent opinion on point, however. In United States v. Ottati & Goss, Inc., No. C-80-225-L (D.N.H., slip op. March 17, 1988), the court prohibited recovery of $336,922 in EPA indirect costs, including expenses for rent, utilities, supplies, clerical staff, and other overhead expenses. The court found that the costs were "necessary to operate the Superfund program" but could not "be attributed directly to the O&G/GLCC sites." The Ottati court gave no further explanation for its decision to deny indirect costs.

Interpreting the statute's visions, its legislative history, the meager case authority on this

issue, I conclude that Congress intended that the United States may recover the "indirect costs" under Section 9607. This portion of plaintiff's motion for summary judgment is granted.

D. Prejudgment Interest

On October 17, 1986, six months before this court's opinion granting plaintiff summary judgment as to liability, Congress added the following language to the end of Section 9607(4):

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous

> Substance Superfund established under subchapter A of chapter 98 of Title 26. . . .

42 U.S.C.A. § 9607(4) (West Supp. 1987).

In this case this court is bound by the amended provision, despite its enactment after much of the requested interest had accrued. See Bradley v. Richmond School Board, 416 U.S. 696 (1974). Even interpreting 42 U.S.C. 9607(a) prior to the amendment, prejudgment interest would be appropriate. United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823 (W.D. Mo. 1984) (holding prejudgment interest recoverable), aff'd, 810 F.2d 726 (8th Cir. 1986), cert. denied, 108 S.Ct. 146 (1987); see also Walls v. Waste Resource Corp., 823 F.2d 977, 981 (6th

Cir. 1987) (stating that subsequent legislative history of CERCLA provides "useful guidance" to unsettled interpretation). In the absence of a statutory provision to the contrary, the award of prejudgment interest is a matter addressed to the discretion of the court. Bricklayer's Pension Trust Fund v. Taiariol, 671 F.2d 988 (6th Cir. 1982). Congress intended CERCLA to provide a mechanism for recovery of all costs of removal actions from those who are responsible. See Rogers v. United States, 332 U.S. 371, 373 (1947) (prejudgment interest for statutory obligation depends in part upon Congressional purpose in imposing obligation). Interest lost on monies expended from the Superfund was part of the cost to the government of removing

hazardous substances from the Northernaire site.

Interpreting CERCLA to fulfill Congress' purpose of fully reimbursing the federal government for its cleanup expenses, I conclude that prejudgment interest, like attorney's fees and the other costs discussed above, was recoverable even before the 1986 amendment, and is appropriate in this case. I am aware that other courts have denied prejudgment interest. See SCRDI, supra; Ottati & Goss, supra. However, I find that the intent of Congress was to grant such interest, and that prejudgment interest is necessary to fully compensate plaintiff for its cleanup and enforcement efforts. NEPACCO, 579 F. Supp. at 852.

Section 9607 now provide that the rate of prejudgment interest payable is the same as the rate of interest on investments of the Hazardous Substance Superfund. In his affidavit, Mr. Hackley sets forth the interest rates on Superfund investments for each year from 1984 through 1987, which range from 5.63 to 10.82 percent. Even in the absence of the amendment, applying these rates makes sense if plaintiff is to be reimbursed for what it has actually expended. Section 9607 also provides that the interest shall accrue from the later of either the date payment of a specified amount is demanded in writing, or the date of the expenditure concerned. Here, plaintiff demanded reimbursement for some of its expenses on or about August 13, 1984.

However, many of the costs recovered in this action were not actually incurred until after August 13, 1984. Therefore, although the court finds that plaintiff is entitled to reimbursement of $233,344.97 in EPA costs and $35,473.28 in Department of Justice costs, and although plaintiff is entitled to prejudgment interest on those costs at the annual rates set forth in Mr. Hackley's affidavit, plaintiff is not entitled to interest on the entire amount calculated from August 13, 1984. The court will delay ruling on the total amount of interest due plaintiff until the parties agree among themselves on an amount or, in the event no agreement is reached, supply the court with affidavits calculating the amount of interest due

taking into account the date on which the expenditures occurred.

III. Conclusion

Plaintiff's motion to strike jury demand is granted. No issue of material fact remains concerning all of the costs recoverable under 42 U.S.C. § 9607(a), except for the costs of the title search and the interest. Plaintiff's motion for summary judgment is denied as to the amount owed plaintiff for the title search and for prejudgment interest. The court will delay ruling on the title search cost and the total interest to be awarded pending submission of further affidavits.

Douglas W. Hillman
Chief Judge

Dated: May 6, 1988

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

NORTHERNAIRE PLATING CO.,
WILLARD S. GARWOOD and
R.W. MEYER, INC.,

Defendants and
Third-Party Plaintiffs,

-vs-

CITY OF CADILLAC,

Third-Party Defendant
and Fourth-Party
Plaintiff,

-vs-

R.W. MEYER, JR., R.W. MEYER SR.,
Individually and d/b/a R.W. MEYER
CONSTRUCTION COMPANY,

Fourth-Party Defendants.
_____/

Case No. G84-1113 CA7

ORDER
Entered May 6, 1988

In accordance with the opinion filed this date,

IT IS ORDERED that plaintiff's motion for summary judgment on costs is granted as to $268,818.25, consisting of all sought except for interest and the $993.00 paid to GCA for the title search.

IT IS FURTHER ORDERED that defendant is liable for prejudgment interest on the $268,818.25, and that within 30 days of this order, the parties shall file with the court a stipulation as to the amount of interest owed under Section 9607(a). In the event agreement cannot be reached, plaintiff shall file an affidavit or affidavits setting forth the total amount of interest due under Section 9607(a), taking into account

the date on which each expenditure occurred. The court's ruling on the amount of prejudgment interest to be awarded plaintiff will be held in abeyance pending receipt of this information.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment on defendant's liability for the $993 paid to GCA is denied.

IT IS FURTHER ORDERED that within 30 days of the filing of this order, the parties shall submit affidavits or other evidence concerning the title search expense so that the court may determine, without the expense of trial, whether plaintiff is entitled to judgment on this amount.

IT IS FURTHER ORDERED that plaintiff's motion to strike jury demand is granted.

Douglas W. Hillman
Chief Judge

Dated: May 6, 1988